

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA**

SONY MUSIC ENTERTAINMENT, *et al.*,

Plaintiffs,

v.

Case No. 1:18-cv-00950-LO-JFA

COX COMMUNICATIONS, INC., *et al.*,

Defendants.

**DECLARATION OF THOMAS KEARNEY IN SUPPORT OF
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

I, Thomas Kearney, hereby declare pursuant to 28 U.S.C. § 1746 as follows:

1. I am Of Counsel with the firm of Winston & Strawn LLP, attorneys of record for Cox Communications, Inc. and CoxCom, LLC (collectively, "Cox") in this matter. I am a member of the bar of the State of California, and my application to practice before this Court *pro hac vice* in this matter is pending. I have personal knowledge of all facts stated in this declaration, except where facts are stated on information and belief, and as to such facts I believe them to be true. If called upon as a witness, I could and would testify competently thereto.

**Excerpts from Depositions
of Plaintiff and Third-Party Witnesses**

2. **Exhibit 1** is a true and correct copy of relevant excerpts from the June 13, 2019 deposition transcript of Sam Bahun, who was the Rule 30(b)(6) designee for MarkMonitor, Inc. For ease of reference, the portions of Mr. Bahun's transcript cited in Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment are set forth here:

a) 197:3-10: [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

b) 147:15-25: [REDACTED]

[REDACTED]

c) 149:13-151:1 [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

d) 50:12-13: [REDACTED]

[REDACTED]

e) 102:25-103:21: [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] ase

f) 100:23-101:1:

g) 149:18-19: "our system ... looks and appears as a functioning peer in the swarm[.]"

3. **Exhibit 2** is a true and correct copy of relevant excerpts from the June 28, 2019 deposition transcript of Plaintiffs' expert Barbara Frederiksen-Cross. For ease of reference, the portions of Ms. Fredericksen-Cross's transcript cited in Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment are set forth here:

a) 46:5-11:

b) 50:1-15:

c) 58:4-9: [REDACTED]

[REDACTED]

[REDACTED]

d) 45:2-19: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

4. **Exhibit 3** is a true and correct copy of relevant excerpts from the May 6, 2019 deposition transcript of Vance Ikezoye, the Rule 30(b)(6) designee of Audible Magic Corporation. For ease of reference, the portions of Mr. Ikezoye's transcript cited in Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment are set forth here:

a) 48:14-21: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

b) 72:18-73:2: [REDACTED]

[REDACTED]

c) 71:18-24:

d) 175:21- 176:18:

5. **Exhibit 4** is a true and correct copy of relevant excerpts from the June 10, 2019
transcript of Steven Marks, the Rule 30(b)(6) designee of the Recording Industry
Association of America (“RIAA”). For ease of reference, the portions of Mr. Marks’s transcript
in Defendants’ Memorandum of Law in Support of Their Motion for Summary Judgment are
set forth here:

a) 90:13-24: [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

b) 36:8-24: [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

c) 65:11-66:7: [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

d) 76:14-24: [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

e) 77:6-10: [REDACTED]

[REDACTED]

f) 88:18-93:7:

A series of 11 horizontal black bars of varying lengths, decreasing in size from top to bottom. The bars are evenly spaced and extend across the width of the frame.

6. **Exhibit 5** is a true and correct copy of relevant excerpts from the June 20, 2019 deposition transcript of Plaintiffs' expert George P. McCabe. For ease of reference, the portions of Dr. McCabe's transcript cited in Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment are set forth here:

a) 88:10-13:

7. **Exhibit 6** is a true and correct copy of relevant excerpts from the May 23, 2019 deposition transcript of Alasdair McMullan, the 30(b)(6) designee of the Universal Music Group Plaintiffs. For ease of reference, the portions of Mr. McMullan's transcript cited in Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment are set forth here:

a) 60:2-4: [REDACTED]

[REDACTED]

b) 60: 22-24: [REDACTED]

[REDACTED]

c) 99:5-9: [REDACTED]

[REDACTED]

8. **Exhibit 7** is a true and correct copy of relevant excerpts from the July 2, 2019 deposition transcript of Slawomir Paszkowski, the Rule 30(b)(6) designee of MarkMonitor Inc. For ease of reference, the portions of Mr. Paszkowski's transcript cited in Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment are set forth here:

a) 80:9-85:9: [REDACTED]

b) 81:19-83:16: (See above)

c) 128:14-129:5:

d) 89:17-22:

e) 129:2-5 :

f) 91:19-22:

g) 41:2-21:

h) 53:5-54:18

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

9. **Exhibit 8** is a true and correct copy of relevant excerpts from the June 28, 2019 deposition transcript of Steven Poltorak, the Rule 30(b)(6) designee of the Warner Music Group Plaintiffs. For ease of reference, the portions of Mr. Poltorak's transcript cited in Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment are set forth here:

a) 57:10-19: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

b) 47:23-48:11: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Excerpts from Depositions of Defendants' Witnesses

10. **Exhibit 9** is a true and correct copy of relevant excerpts from the April 25, 2019 deposition transcript of Matthew Carothers, Cox's Rule 30(b)(6) designee. For ease of reference,

the portions of Mr. Carothers's transcript cited in Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment are set forth here:

a) Dep. 144:8-13: [REDACTED]

[REDACTED]

11. **Exhibit 10** is a true and correct copy of relevant excerpts from the April 10, 2019 deposition transcript of Paul Jarchow, Cox's 30(b)(6) designee. For ease of reference, the portions of Mr. Jarchow's transcript cited in Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment are set forth here:

a) 160:22-25 [REDACTED]

[REDACTED]

b) 10:18-11: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

c) 12:16-24: [REDACTED]

[REDACTED]

[REDACTED]

d) 98:2-118:8 – reviewing and authenticating the following exhibits:

- COX_SONY 97360 – (Jarchow Exhibit 16)
- COX_SONY 97361 – (Jarchow Exhibit 17)
- COX_SONY 97362 – (Jarchow Exhibit 18)
- COX_SONY 97363 – (Jarchow Exhibit 19)

- COX_SONY 97364 – (Jarchow Exhibit 20)
- COX_SONY 97365 – (Jarchow Exhibit 21)
- COX_SONY 97367 – (Jarchow Exhibit 23)
- COX_SONY 97366 – (Jarchow Exhibit 22)

12. **Exhibit 11** is a true and correct copy of relevant excerpts from the April 5, 2019 deposition transcript of Sanford Mencher, Cox's Rule 30(b)(6) designee. For ease of reference, the portion of Mr. Mencher's transcript cited in Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment are set forth here:

a) 44:7-12 [REDACTED]

[REDACTED]

[REDACTED]

13. **Exhibit 12** is a true and correct copy of relevant excerpts from the June 14, 2019 deposition transcript of Sidd Negretti, Cox's Rule 30(b)(6) designee. For ease of reference, the portions of Mr. Negretti's transcript cited in Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment are set forth here:

a) 183:11-15: [REDACTED]

[REDACTED]

[REDACTED]

b) id. 188:22-189:4: [REDACTED]

[REDACTED]

Expert Reports

14. **Exhibit 13** is a true and correct copy of the Expert Report of Plaintiffs' Expert Barbara Frederiksen-Cross, served on April 10, 2019. For ease of reference, the portions of Ms. Fredericksen-Cross's report cited in Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment are set forth here:

a) ¶ 55: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

b) ¶78: [REDACTED]

[REDACTED]

[REDACTED]

c) ¶ 81: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

e) ¶ 27: [REDACTED]

[REDACTED]

f) ¶ 17, 60: [REDACTED]

g) ¶ 89: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

h) ¶¶ 82-83: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

i) ¶ 97: [REDACTED]

j) ¶ 92: [REDACTED]

[REDACTED]

15. **Exhibit 14** is a true and correct copy of the Supplemental and Reply Report of Plaintiffs' Expert Barbara Frederiksen-Cross, served on June 13, 2019. For ease of reference, the portions of Ms. Frederiksen-Cross's Supplemental and Reply Report cited in Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment are set forth here:

a) ¶¶ 20, 22: [REDACTED]

[REDACTED]

b) ¶ 17: [REDACTED]

[REDACTED]

c) ¶ 38: [REDACTED]

d) ¶ 12: [REDACTED]

[REDACTED]

16. **Exhibit 15** is a true and correct copy of the Expert Report of Plaintiffs' Expert William Lehr, served on April 19, 2019. For ease of reference, the portions of Dr. Lehr's report cited in Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment are set forth here:

a) ¶ 27: [REDACTED]

[REDACTED]

17. **Exhibit 16** is a true and correct copy of the Expert Report of Plaintiffs' Expert George P. McCabe, served on April 10, 2019. For ease of reference, the portions of Dr. McCabe's report cited in Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment are set forth here:

a) ¶ 16(c): [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

b) ¶ 4: [REDACTED]

[REDACTED]

[REDACTED]

¶ 24: [REDACTED]

18. **Exhibit 17** is a true and correct copy of the Expert Report of Plaintiffs' Expert Terrence P. McGarty, served on April 10, 2019. For ease of reference, the portions of Mr. McGarty's report cited in Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment are set forth here:

a) ¶18: [REDACTED]

19. **Exhibit 18** is a true and correct copy of the Rebuttal Expert Report of Cox's Expert Dr. Nick Feamster, served on May 15, 2019. For ease of reference, the portions of Dr. Feamster's Rebuttal Report cited in Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment are set forth here:

a) ¶88: [REDACTED]

b) ¶111: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

For more information, contact the Office of the Vice President for Research and the Office of the Vice President for Student Affairs.

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c) ¶ 93-98:

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10.1007/s00332-010-9000-0

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A series of 15 horizontal black bars of varying lengths, decreasing in size from top to bottom. The bars are evenly spaced and extend across the width of the frame.

d) ¶ 42: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

e) ¶ 99: [REDACTED]

[REDACTED]

[REDACTED]

A series of 11 horizontal black bars of varying lengths, decreasing in size from top to bottom. The bars are evenly spaced and extend across the width of the frame.

f) ¶ 129: [REDACTED]

g) ¶¶ 101, 102: [REDACTED]

A series of seven horizontal black bars of varying lengths, decreasing in size from top to bottom. The bars are evenly spaced and extend across the width of the frame.

h) ¶ 132: [REDACTED]

- [REDACTED]
- [REDACTED]
- i) Appx. C [see attached Ex. 18]
- j) ¶ 130: [REDACTED]
- k) Appendix B to the Feamster Report is a sample Evidence Package showing a partial file download. [see attached Ex. 18]

20. **Exhibit 19** is a true and correct copy of the Rebuttal Expert Report of Cox's Expert Dr. Kevin Almeroth, served on May 15, 2019. For ease of reference, the portions of Dr. Almeroth's Rebuttal Report cited in Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment are set forth here:

- a) ¶¶ 100-101: [REDACTED]
- [REDACTED]



**ECF Filed Documents
(included for ease of reference)**

21. **Exhibit 20** is a true and correct copy of ECF 82-7 (Parry Dec. at ¶ 6: “When an album is registered in its entirety, the registration covers all of the songs on that album that have not been previously released, and which are themselves eligible for copyright protection, which generally is between 10 and 15 songs.”);

22. **Exhibit 21** is a true and correct copy of ECF 82-8 (Leak Dec. at ¶ 13: “When an album is registered in its entirety, the registration covers all of the songs on that album that have not been previously released, which generally is between 10 and 15 songs.”);

**RIAA notice program
Master Agreement and Statement of Work**

23. **Exhibit 22** is a true and correct copy of RIAA_00000003-16, which was produced by third-party RIAA in this matter on February 22, 2019. This document is titled “Master Agreement” and dated December 20, 2011 (“Master Agreement”). The Master Agreement states that it was entered into between DtecNet, Inc. and RIAA. On information and belief, and as stated in Exhibits 24A and 25B in ¶25 below, DtecNet, Inc. was subsequently purchased by MarkMonitor, Inc., which thereby became a party to the Master Agreement. The Master Agreement states:

a) [REDACTED]

[REDACTED]

[REDACTED] *Id.* at RIAA_00000006.

b) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* at RIAA_00000006.

c) [REDACTED]

[REDACTED] *Id.* at RIAA_00000006.

d) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* at

RIAA_00000012.

24. **Exhibit 23** is a true and correct copy of RIAA_00000017-29 (the “2012 SOW”), which was produced by third-party RIAA in this matter on February 22, 2019. This document, titled “SOW: RIAA Commercial ISP Program” and dated February 15, 2012, states that it “is made with reference to” the December 20, 2011 agreement between DtecNet and RIAA. *Id.* at RIAA_00000017. The 2012 SOW states:

a) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] *Id.*

b) [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] *Id.* at RIAA_00000026.

c) Appendix C of the 2012 SOW is a table of [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] *Id.* at RIAA_00000029. Appendix C states: [REDACTED]

[REDACTED] *Id.*

25. **Exhibit 24A** is a true and correct copy of a document Bates labeled RIAA_00000030-44, which was produced by third-party RIAA in this matter on February 22, 2019, titled “Statement of Work (‘SOW’).” The document, “dated as of March 22, 2013, is made with reference to that certain Master Agreement between MarkMonitor Inc. (Formerly ‘DtecNet Inc.’ and hereinafter ‘MarkMonitor’) and the Recording Industry Association of America (‘RIAA’) dated as of 20th of December 2011[.]” *Id.* at RIAA_00000030. **Exhibit 24B** is a true and correct copy of a document Bates labeled RIAA_00000045-58, which was produced by third-party RIAA in this matter on February 22, 2019, titled “Statement of Work (‘SOW’).” The document, “dated as of March 17, 2014, is made with reference to that certain Master Agreement between MarkMonitor Inc. (formerly ‘DtecNet Inc.’ and hereinafter ‘MarkMonitor’) and the Recording Industry Association of America (‘RIAA’) dated as of 20th of December 2011[.]” *Id.* RIAA_00000045.

26. **Exhibit 25** is a true and correct copy of a document Bates labeled RIAA_00127769-88, which was produced by third-party RIAA in this matter on February 22, 2019. The document (the “Stroz Friedberg Assessment”) is titled “Independent Expert Assessment of MarkMonitor AntiPiracy Methodologies,” and dated October 14, 2012. According to the Stroz Friedberg Assessment:

a) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* at RIAA_00127771.

b) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* at RIAA_00127774.

c) [REDACTED]

[REDACTED]

[REDACTED] *Id.* at RIAA_00127777.

d) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* at [REDACTED]

RIAA_00127777.

e) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* at RIAA_00127777.

f) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* at RIAA_00127780.

g) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* at RIAA_00127786.

h) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* at RIAA_00127775.

i) [REDACTED]

[REDACTED]

[REDACTED]
[REDACTED] *Id.* at RIAA_00127779.

j) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] *Id.* at

RIAA_00127784-785.

RIAA Notices

27. **Exhibit 26** is a true and correct copy of Plaintiffs_00286430 (“Plaintiffs’ Notice Chart”), which Plaintiffs produced in discovery on March 25, 2019. According to metadata produced with the file, the original file name of this document was “RIAA notices sent to Cox 2012-2015.txt,” and Plaintiffs have represented that this document is a spreadsheet summarizing 284,444 notices sent on behalf of RIAA to Cox between January 2, 2012 and March 31, 2015.¹

28. I have reviewed Plaintiffs’ Notice Chart, and it contains the following column names corresponding to data in the RIAA Notices:

- InfringementDetected
- NoticeSent
- NoticeId
- NoticeSentTo
- NoticeSentFrom
- Title

¹ Because this document was produced in a text-only data format (in which data fields are separated by tabs), for ease of use I caused an Excel spreadsheet version of the document to be prepared under my direction. That Excel spreadsheet version, which is attached as **Exhibit 26A**, is substantively equivalent to the original spreadsheet, and I refer to both **Exhibit 26** and **Exhibit 26A** as “Plaintiffs’ Notice Chart.”

- Artist
- HashText
- Protocol
- FileSize
- FileName
- PeerIP
- PeerPort
- ISP

29. Based on my review, Plaintiffs' Notice Chart contains 163,148 entries where the "NoticeSent" date is between Feb. 1, 2013 and Nov. 26, 2014 (the "Claims Period"). These 163,148 entries contain 1,998 unique combinations of Title and Artist. **Exhibit 27** ("Noticed Works by Artist"), which was prepared under my direction, is a true and correct copy of spreadsheet data excerpted from Plaintiffs' Notice Chart. The Noticed Works by Artist spreadsheet lists each of the 1,998 unique Title-and-Artist combinations in the RIAA Notices concerning alleged infringements during the Claims Period. This document was prepared by: (1) filtering Plaintiffs' Notice Chart to display only notices sent during the Claims Period; (2) de-duplicating the list so that each unique combination of Title and Artist appears only once; and (3) displaying only the Title and Artist columns, sorted by Artist. **Exhibit 28** ("Noticed Works by Title"), which was also prepared under my direction, contains the same information as Exhibit 27, but sorted by Title. Moreover, based on my review of Plaintiffs' Notice Chart, even if the notices were interpreted as giving notice of an *entire* album by identifying a *single* song of the same name—that is, where a single song also happened to be the title of an album—the notices would still identify only a fraction of Plaintiffs' sound recordings at issue—approximately 2,288 discrete tracks.

30. **Exhibit 29** is a true and correct copy of representative notices produced by Plaintiffs in this action, each of which Plaintiffs have represented was sent by RIAA to Cox during the Claims Period. These notices bear the following Bates numbers: Plaintiffs_00104130; Plaintiffs_00112675; Plaintiffs_00148396; Plaintiffs_00148541; and Plaintiffs_00200764.

31. **Exhibit 30** is a true and correct copy of a document with Bates number Plaintiffs_00113142, which Plaintiffs produced in this action. This document is a notice sent by RIAA to Cox on March 27, 2013, concerning a work with Title “THE BOOK OF LOVE,” by Artist “THE MAGNETIC FIELDS.” According to the notice, the allegedly infringing file is named “69 Love Songs [Box Set].”

32. **Exhibit 31** is a true and correct copy of a document with Bates number Plaintiffs_00175863, which Plaintiffs produced in this action. This document is a notice sent by RIAA to Cox on November 4, 2013, concerning a work with Title “LIVE AND LET DIE,” by Artist “WINGS.” According to the notice, the allegedly infringing file is named “(2000) – B-Sides Complete @VBR.”

33. **Exhibit 32** is a true and correct copy of a document with Bates number Plaintiffs_00137124, which Plaintiffs produced in this action. This document is a notice sent by RIAA to Cox on June 17, 2013, concerning a work with Title “MOTIVATION,” by Artist “KELLY ROWLAND.” Based on my research, including a search of online Copyright Office registration records, on information and belief the Copyright Office has registered at least 29 musical works titled “Motivation” since 1978; none of them were authored by Kelly Rowland.

Plaintiffs’ Claimed Works

34. I have reviewed and am readily familiar with Plaintiffs’ pleadings in this matter. Plaintiffs filed their Complaint, ECF 1, on July 31, 2018. Plaintiffs filed a First Amended

Complaint, ECF 136, on April 23, 2019. Plaintiffs filed Amended Exhibits A and B, as ECF Nos. 172-1 and 172-2 respectively, on June 13, 2019. Amended Exhibit A lists 7,057 sound recordings as works-in-suit, and Amended Exhibit B lists 3,421 musical compositions as works-in-suit.

35. **Exhibit 33** is a spreadsheet (the “Registration Spreadsheet”) that was prepared at my direction, summarizing copyright registration information that Plaintiffs have produced in discovery for the sound recording works-in-suit. The Registration Spreadsheet contains, for each of the 7,057 sound recording works-in-suit listed on Plaintiffs’ list of claimed works (ECF 172-1):

- The number assigned to the work in Plaintiffs’ list of claimed works, ECF 172-1, together with the Artist, Track (or “Title”), Plaintiff, and Reg. No. (copyright registration number), as they appear in Plaintiffs’ Amended Exhibit A to the First Amended Complaint, ECF 172-1;
- A column, “Beg. Bates,” indicating the Bates number of copyright registration documentation produced by Plaintiffs in this action;
- A column, “Work Made for Hire,” indicating whether the sound recording was registered as a “work made for hire”; and
- A column, “Album or Single,” indicating whether the sound recording was registered as a single work (a “Single”), or as one of multiple works on the same registration (an “Album”).

36. Based on my review of the Registration Spreadsheet:

- 6,777 of Plaintiffs’ 7,057 sound recording works-in-suit were registered as albums (i.e., more than one sound recording was covered by the same copyright registration);
- 6,766 of the sound recording works-in-suit are registered as “works made for hire.”
- Of the 6,766 sound recording works-in-suit registered as works made for hire:
 - 6,496 are covered by 1,158 work-for-hire registrations that include multiple sound recordings (“albums”); and
 - 237 are covered by work-for-hire registrations for a single sound recording (“singles”).
 - The remaining work-for-hire registrations cover types of works that are not readily classifiable as either albums or singles (such as motion pictures or DVDs).

37. **Exhibit 33A** is a compilation of the copyright registration documentation that Plaintiffs have produced in this case for sound recording works-in-suit that were registered as “works made for hire”. Exhibit 33A was created under my direction, by retrieving the documents corresponding to the “Beg. Bates” column in Exhibit 33 for such sound recordings (i.e., those for which the “Work Made for Hire” column in Exhibit 33 showed that registration type). As noted above, the Beg. Bates column specified, for each work in the Registration Spreadsheet, the Bates number of copyright registration documentation produced by Plaintiffs in this action. For ease of reference, the filenames of the files comprising Exhibit 33A also reflect the Bates numbers of the documents.

EXEMPLARY CLAIMED WORKS FOR WHICH NO NOTICES WERE SENT

Weird Al Yankovic Works

38. Plaintiffs’ Notice Chart (Exhibit 26, *see ¶ 27 above*) shows that during the Claims Period, Plaintiffs’ notices referenced only one sound recording by Artist Weird Al Yankovic, namely a track with the Title “Another One Rides the Bus.”

39. Plaintiffs have not produced any information or documents in this action that would indicate that there exists a Weird Al Yankovic album called “Another One Rides the Bus,” and on information and belief, based on my research including a review of Copyright Office records available online, the title “Another One Rides the Bus” does not refer to any Weird Al Yankovic album.

40. Plaintiffs’ list of sound recordings allegedly infringed in this action, filed as ECF 172-1, includes a total of 117 sound recordings by Weird Al Yankovic, including 116 for which no notice was sent during the Claims Period. **Exhibit 34** (“Weird Al Spreadsheet”) is a true and correct copy of a document created under my direction, comprising data extracted from ECF 172-1

that lists sound recordings where the Artist is Weird Al Yankovic. The Weird Al Spreadsheet shows that Plaintiffs claim 117 Weird Al Yankovic works in this case.

41. Plaintiffs' list of allegedly infringed musical compositions also contains six musical compositions whose copyright registrations indicate they were performed by Weird Al Yankovic. **Exhibit 35** is a true and correct copy of Plaintiffs' production concerning copyright registrations for those works. Based on my review, none of these six song titles was identified in an RIAA Notice during the Claims Period. For ease of reference, the information Plaintiffs provided concerning these works in Exhibit 2 to their First Amended Complaint (ECF 172-2) is excerpted here:

| | Track | Reg.No. | Plaintiff |
|------|-----------------------------|----------------|-------------------------------|
| 245 | It's All About The Pentiums | PA0000976952 | EMI April Music Inc. |
| 780 | Achy Breaky Song | PA0000713892 | Polygram Publishing, Inc. |
| 782 | Amish Paradise | PA0000809516 | Polygram Publishing, Inc. |
| 862 | Jurassic Park | PA0000713893 | Polygram Publishing, Inc. |
| 1285 | Good Enough For Now | PA0000311496 | Sony/ATV Music Publishing LLC |
| 1359 | Nature Trail To Hell | PA0000205633 | Sony/ATV Music Publishing LLC |

Audible Magic Data

42. Attached as **Exhibit 36** is a true and correct copy of a document that third-party Audible Magic produced in response to a subpoena from Cox, with Bates number AUDIBLE-MAGIC-0000003-130. This document is titled "Audible Magic OEM Application Programming Guide and Customer Specification Information (November 13, 2012)." At pages Bates numbered AUDIBLE-MAGIC-0000086-92, the document sets out the "Response XML" and states: "Every ID request will return a XML IdResponse. When a match has been identified, the appropriate XML

elements will be populated with information about the match. The amount of metadata supplied will depend upon your service contract with Audible Magic.” *Id.* at AUDIBLE-MAGIC-0000086. The document sets out “Copyright Compliance Applications XML” at AUDIBLE-MAGIC-0000088-92, and provides “a sample Response XML returned from an identification request made against our song reference database,” *id.*

43. On March 27, 2019, MarkMonitor produced a spreadsheet with Bates No. MM000236 (the “‘236 Spreadsheet”). A true and correct copy of the ‘236 Spreadsheet is attached at **Exhibit 37**. The ‘236 Spreadsheet contains four worksheets or “tabs”, titled “BitTorrent Download,” “Single File Downloads eDonkey,” “Single File Downloads Gnutella,” and “Single File Downloads Ares.”

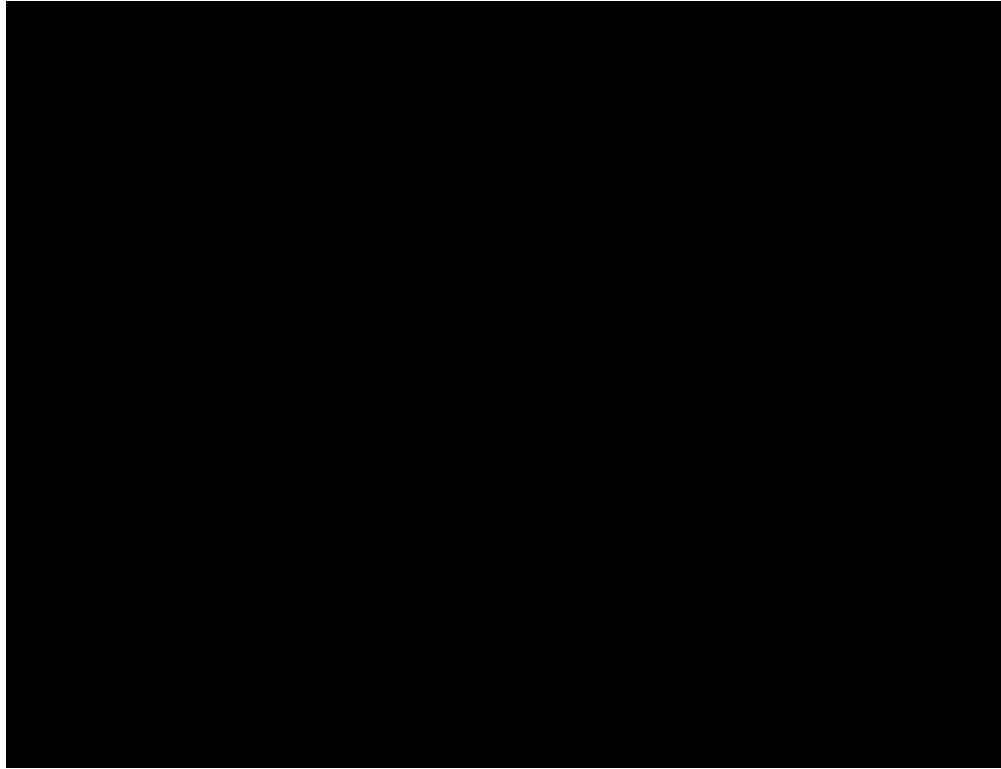
44. Attached hereto as **Exhibit 37A** is a true and correct copy of the '236 Spreadsheet in its native Excel format sorted by the "match_percentage" column in the eDonkey, Ares, and Gnutella tabs. I reviewed the sorted '236 Spreadsheet. I observed that [REDACTED]





45. At his deposition on July 2, 2019, MarkMonitor's 30(b)(6) witness Slawomir Paszkowski testified [REDACTED]. Attached hereto as **Exhibit 38** is a true and correct copy of excerpts from the deposition Slawomir Paszkowski, who was designated as Plaintiffs' 30(b)(6) witness on technical topics, including how MarkMonitor collected the evidence packages during the relevant time period.

46. On March 25, 2019 Plaintiffs produced a spreadsheet with Bates No. Plaintiffs_00286431 (the “‘431 Spreadsheet”). A true and correct copy of the ‘431 Spreadsheet is attached hereto as **Exhibit 39**. I have reviewed the ‘431 Spreadsheet, and confirmed that the file metadata shows that it was [REDACTED]. Below is a screenshot I created of the file metadata I reviewed; I created this screenshot by opening a native version of the ‘431 Spreadsheet, opening the spreadsheet’s “Properties” using the Windows 10 operating system, and capturing an image of the metadata in the “Details” field using the Snipping Tool application.



47. The result of my review is consistent with the review of this file’s metadata that my colleague, Diana Hughes Leiden, also performed in connection with Cox’s Motion to Preclude Plaintiffs’ Use of Certain Evidence, ECF 238. *See* ECF 238-1 (Declaration of Diana Hughes Leiden in Support of Defendants’ Motion to Preclude Plaintiffs’ Use of Certain Evidence) (“Leiden Sanctions Dec.”) at ¶ 6-7; ECF 238-7 (Ex. F to Leiden Sanctions Decl.).

48. On April 26, 2019, Audible Magic produced a spreadsheet with the Bates No. AUDIBLE-MAGIC-0007657 (which is sometimes referred to as REV00003444) (the “Audible Magic Spreadsheet”). A true and correct copy of the Audible Magic Spreadsheet is attached as **Exhibit 40**. The Audible Magic Spreadsheet contains significantly more information than the ‘431 Spreadsheet (Exhibit 39).

MarkMonitor Documents

49. **Exhibit 41** is a true and correct copy of a document produced by MarkMonitor in this action, with Bates number MM000189 - 221. This document is titled “MarkMonitor P2P Enforcement Process” and dated April 11, 2012. Its cover page indicates that it was [REDACTED]
[REDACTED]

a) At pp. 24-25 (Bates MM000212-13), the document describes the MarkMonitor “File Verification protocol.”

b) At p. 25 (Bates MM000213), under the heading [REDACTED]
[REDACTED]
[REDACTED]

c) At p. 26, the document states: [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Other Discovery

50. I am readily familiar with discovery that has been conducted and documents that have been exchanged in this litigation. To my knowledge, Plaintiffs and their agents (including the RIAA and MarkMonitor) have not produced files, or pieces of files, purporting to be copies of works-in-suit downloaded from any Cox subscriber.

51. When Cox offered to identify a sampling of Cox subscribers who had been the subject of notices alleging infringement, Plaintiffs declined the offer. At Plaintiffs’ request, Cox did subsequently identify thousands of Cox Business subscribers who had received such notices. On information and belief, Plaintiffs have not sought to obtain any discovery with that information.

52. On information and belief, Plaintiffs did not attempt to obtain discovery from any Cox subscriber during the course of this litigation.

53. Plaintiffs have submitted a proposed Trial Exhibit (PX-0038), a table titled “Sound Recordings and Musical Compositions. A true and correct copy of PX-0038 is attached hereto as **Exhibit 42**. PX-0038 indicates that 882 of Plaintiffs’ claimed musical compositions are claimed only as musical compositions: that is, Plaintiffs claim that the musical composition was infringed, but do *not* claim that any sound recording corresponding to the composition was infringed. PX-0038 also indicates that, according to Plaintiffs’ own analysis, for 2,556 of the musical compositions they claim, they also claim corresponding sound recordings. *Id.*

54. **Exhibit 43** is a true and correct copy of the April 15, 2019 deposition transcript of Linda Trickey, Cox’s 30(b)(6) witness. For ease of reference, the portions of Ms. Trickey’s deposition cited in Defendants’ Memorandum of Law in Support of Their Motion for Summary Judgment are set forth here:

a) 50:12-22: [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

b) 51:5-18: [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

c) 56:20-57:1: [REDACTED]

d) 44:5-10: [REDACTED]

e) 307:3-8: [REDACTED]

55. **Exhibits 44-51** comprise true and correct copies of customer billing reports Cox produced in this litigation with the following Bates numbers:

COX_SONY_00097360 (Exhibit 44); COX_SONY_00097361 (Exhibit 45);

COX_SONY_00097362 (Exhibit 46); COX_SONY_00097363 (Exhibit 47);

COX_SONY_00097364 (Exhibit 48); COX_SONY_00097365 (Exhibit 49);

COX_SONY_00097366 (Exhibit 50); COX_SONY_00097367 (Exhibit 51).

These exhibits contain data that Cox extracted from its billing system, relating to billing and payment information for Cox subscribers who were the subject of an RIAA Notice during the Claims Period. *See Exhibit 10 (Jarchow Deposition excerpts)*, above, at 98:2-118:8. Cox's 30(b)(6) designee, Paul Jarchow, supervise the preparation of these reports. *Id.* at 12:16-24 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]).

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 30th day of August, 2019 in Kensington, California.

/s/ /Thomas J. Kearney/
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